NO. 48689-0-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,
Respondent,

v.

BRANNON I. JONES,
Appellant.

APPEAL FROM THE SUPERIOR COURT OF THE STATE
OF WASHINGTON FOR GRAYS HARBOR COUNTY

THE HONORABLE STEPHEN BROWN, JUDGE

BRIEF OF RESPONDENT

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BY: _____
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RESPONDENT'S COUNTER STATEMENT OF THE CASE

Factual History

On October 21, 2015, Chrystal Weld discovered tools had been stolen from her and her husband Michael's property in Elma, Washington. RP 7. The Welds had been working on the property which included a large pasture, a residence, a barn, and a shop. RP 8-12. They were not living on the property but working on it with plans to eventually move there. *Id.* Prior to October 21, 2015, the Welds had made it known to family that there were numerous tools inside the residence and barn, and that they had not yet moved onto the property. RP 12-13, 25-26. After finding the tools stolen, Chrystal made the fact known to family and friends. RP 13-14. The Appellant is Mr. Weld's nephew. RP at 16.

The ensuing investigation by the Sheriff's Office revealed that the thieves parked across the street from the property and entered from the pasture. RP 63-64. They cut a fence separating the property from Cloquallum Road to gain entry. RP 9, 23, 63-64. They gained entry to the Welds' residence and barn through a gate. RP 9-23. They stole the tools from the buildings and used a wagon, wheelbarrow, and wheeled garbage can to transport the tools to their vehicle parked across the street. RP 10-12, 21-22, 65-66. The thieves left some tools behind, which were located

along with batteries around the cut fence. RP 12. After Chrystal discovered the tools had been stolen, she observed the Appellant walking away from the Welds' property, approximately half a mile away. RP 14.

Following the theft, Travis Delbrouck approached Kelly Marks proposing to sell the $3,000 worth of stolen tools for $500. RP 20, 31-32. Marks made a $100 payment with an agreement to make another payment the following day when the tools would be transferred. RP 31-32. Michael Welds' nephew Brannon I. Jones, the Appellant, spent the evening prior to the transfer at Delbrouck's residence. RP 112. The next day, the two met with Marks, both the Appellant and Delbrouck helped transfer the tools to Marks, and Marks made the payment to Delbrouck. RP 35.

In the course of his investigation of the matter, Deputy Carson Steiner of the Grays Harbor County Sheriff's Office determined Marks was in possession of the Welds' stolen tools. Marks revealed the details of the transaction and identified both the Appellant and Delbrouck in photo montages, indicating they were involved in the transaction. RP 40-43, 75-80. Deputy Steiner subsequently located and interviewed Delbrouck, who provided a consistent account of the incident.

Later, Deputy Steiner observed the Appellant driving with a suspended license and conducted a traffic stop. RP 81-82. The Appellant pulled into a friend's driveway and, immediately upon stopping, fled on foot. *Id.* Deputy Steiner pursued the Appellant and heard him yell to the occupants of the residence, "Come on guys. Let me in." RP 82. The Appellant then fled the residence with Deputy Steiner pursuing him and calling out for the Appellant to stop. RP 82-83. The Appellant did not comply and ran, dropping batteries behind him. RP at 83. Deputy Steiner eventually apprehended the Appellant. RP 84.

Following the foot pursuit, the Appellant stated that he knew Deputy Steiner wanted to speak to him about stolen property. RP 84. Without any mention from Deputy Steiner of Marks or Delbrouck, the Appellant stated that he did not know "Kelly or Travis well." RP 85. He further admitted to being present when the stolen tools were sold to Marks. RP 87. Following the interview, Deputy Steiner located methamphetamine in the hooded sweatshirt worn by the Appellant. RP 89.

After being taken into custody, the Appellant was interviewed by Detective Keith Peterson of the Grays Harbor County Sheriff's Office. The Appellant admitted he was familiar with Marks from prior

interactions, and that he was aware of the arrangement between Marks and Delbrouck. RP 55-56. The Appellant stated that following the transaction, Delbrouck gave the Appellant a share of the proceeds to buy meth. RP 58.

Procedural History

On January 25, 2016 an Amended Information was filed that charged the Appellant with three criminal counts: count 1, Trafficking in Stolen Property in the First Degree; count 2, Possession of a Controlled Substance; and count 3, Driving While License Suspended in the Third Degree. CP 20-21. Trial commenced on February 10, 2016 and concluded the following day. CP 80-82.

At trial, the State presented testimony from Chrystal and Michael Weld, Kelly Marks, Detective Peterson, and Deputy Steiner. The Appellant called one witness, Delbrouck. The above facts were admitted into evidence through the above witnesses.

During direct examination of Delbrouck, defense counsel referred to a prior written statement that Deputy Steiner obtained from Delbrouck. RP 110. Delbouck testified he was untruthful in his initial statement for the purpose of obtaining a more favorable outcome to his case. RP 110, 113. On cross examination he testified as to the specifics of his original

statement. He testified that the he agreed to and did give the Appellant half of the proceeds from the sale of the stolen tools. RP 111-112. Additionally, evidence of Delbrouck's prior convictions for crimes of dishonesty was admitted. RP 114-115.

In closing arguments, the State highlighted the Appellant's post-*Miranda* statements in closing. The State further highlighted that the Appellant's actions of running from Deputy Steiner and his failure to report what the evidence inferred he knew. RP 148-149. Also in closing, the State highlighted Delbrouck's initial written statement to Deputy Steiner, the argued the following:

> Do we want to believe that the defendant – that Mr. Delbrouck was telling the truth on the stand, that the reason he gave [the prior statement to Deputy Steiner] was only because he wanted to get a better deal and not because it was the truth? This is a man who has a history of committing crimes of dishonesty. He acknowledged that he had been convicted of identity theft second degree, trafficking of stolen property second degree, trafficking of stolen property first degree, 2013, 2011, 2009. This is a man who is not – was not to be trusted as far as that testimony.

RP 153.

The Appellant was convicted of all three counts and was sentenced on March 4, 2016. CP 102-113. At sentencing, Judge Brown addressed the Appellant's ability to pay legal financial obligations. He stated that once the Appellant completed court ordered chemical dependency he would have the ability to work and pay his LFOs. RP 185-186. Judge Brown stated:

> If you turn your life around you're going to be able to, you know, have a job, make at least partial payments on these minimal costs. So that's why I – it's clear to me that if you do that, you're – there's no reason why you can't earn an income and make payments over – over this. There's 12 months of community custody with the conditions including evaluation and treatment. You can take care of part of that while you're in prison.

RP 186.

ARGUMENT

1. Sufficient evidence was admitted at trial to support the jury's guilty verdict.

"The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt." *State v. Salinas*, 119 Wn. 2d 192, 201, 829 P.2d 1068, 1074

(1992) (citing *State v. Green,* 94 Wash.2d 216, 220–22, 616 P.2d 628 (1980).) "When the sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant." *Id.* (citing *State v. Partin,* 88 Wash.2d 899, 906–07, 567 P.2d 1136 (1977).) "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *Id.* (citing *State v. Theroff,* 25 Wash.App. 590, 593, 608 P.2d 1254, *aff'd,* 95 Wash.2d 385, 622 P.2d 1240 (1980).) Appellate courts "defer to the trier of fact for purposes of resolving conflicting testimony and evaluating the persuasiveness of the evidence." *State v. Homan*, 181 Wn. 2d 102, 106, 330 P.3d 182, 185 (2014) (citing *State v. Jackson,* 129 Wash.App. 95, 109, 117 P.3d 1182 (2005).)

The Appellant was charged by information with three counts, including, count one, Trafficking in Stolen Property in the First Degree. The elements of the class B felony are defined in RCW 9A.82.050(1) as, "A person . . . who knowingly traffics in stolen property, is guilty of trafficking in stolen property in the first degree."

The jury was instructed consistently with the above. CP at 41-42. The jury was also instructed as to the term "knowingly," from WPIC 10.02, which was based on RCW 9A.08.010(1)(b), and defined as follows,

> A person knows, or acts knowingly, or with knowledge with respect to a fact, circumstance, or result when he is aware of that fact, circumstance, or result. It is not necessary that the person know that the fact, circumstance, or result is defined by law as being unlawful or an element of a crime.
>
> If a person has information that would lead a reasonable person in the same situation to believe that a fact exists, the jury is permitted but not required to find that he or she acted with knowledge of that fact.

CP at 44.

The jury also could have found the Appellant guilty as an accomplice to Trafficking in Stolen Property in the First Degree. According to RCW 9A.08.020(2)(c), "A person is legally accountable for the conduct of another person when . . . he is an accomplice of such other person in the commission of the crime." According to section (3), "accomplice" is defined as follows:

> (a) With knowledge that it will promote or facilitate the commission of the crime, he:

> (i) Solicits, commands, encourages, or requests such other person to commit it; or
>
> (ii) Aids or agrees to aid such other person in planning or committing it; or
>
> (b) His or her conduct is expressly declared by law to establish his or her complicity.

RCW 9A.08.020(3). The jury was instructed consistent with the above. CP at 45.

In the present case, there was more than sufficient evidence available to the jury to find the Appellant guilty. First, the testimony showed that the Appellant was intricately involved through his presence with the participants of the sale of the stolen property. Marks testified that the Appellant was present at the time of the transfer of the stolen tools, and assisted with the transfer. The Appellant himself admitted being there and helping transfer the tools. The Appellant told the Sheriff's Office that he had known Marks prior to the incident. The Appellant spent the night with Delbrouck prior to the actual sale of the tools, in which Delbrouck received the payment from Marks. The Appellant told law enforcement that he had received money from Delbrouck that he received from the sale and that he spent the money on methamphetamine. These facts infer the Appellant's knowledge that the stolen tools were being sold. Furthermore,

given the value of the tools, $3000, the Appellant may be inferred to have known the tools were stolen given that Marks paid only $500 for the tools.

Second, the evidence was consistent with the Appellant being involved or having participated in the actual theft. The Appellant is Michael Weld's nephew; therefore, the presence of the tools on the Welds' property was known to him. The fact that the Welds were not living at the residence was probably known to him, as the Welds had also made that fact known to their family and friends. Also, the manner in which the tools were stolen implied that the thieves had knowledge of the property; they knew where to enter the property, how to get to the buildings from the pasture, and that a wagon, a wheel barrow and garbage can were available to facilitate the transport of the tools.

Other facts associated with the property inferred the Appellant's knowledge. For instance, the Appellant was observed walking away from the Welds' property after they discovered the tools were stolen, and additional tools were stashed at the cut fence. Additionally, batteries were found with the stashed tools, and the Appellant was found with batteries when chased by Deputy Steiner.

Third, the jury could have drawn inferences of consciousness of guilt from the Appellant's flight from Deputy Steiner's traffic stop. Upon

observing the deputy's emergency lights activated, the Appellant pulled into a friend's driveway and fled from his vehicle. He then attempted to gain entry to the residence yelling, "Come on guys," and "Let me in." Despite Deputy Steiner's calls for the Appellant to stop, the Appellant continued to evade him and was only apprehended following a lengthy foot pursuit. After being apprehended, the Appellant told Deputy Steiner he knew the deputy wanted to speak to him about the stolen property. Clearly, the jury could have inferred from these facts that the Appellant fled because he was knowingly involved in the transfer of the stolen tools.

2. Counsel was not ineffective because the argument was not objectionable.

The Washington State Supreme Court adopted a two prong test stated for analysis of the effectiveness of a defense counsel performance. *Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984). The Court stated that "[t]he purpose of the requirement of effective assistance of counsel is to ensure a fair and impartial trial." *State v. Thomas,* 109 Wn.2d 222, 225 (1987). In order to maintain a claim of ineffective assistance of counsel, the defendant must show not only that his attorney's performance fell below an acceptable standard, but also that his attorney's failure affected the outcome of the trial.

Strickland v. Washington explains that the defendant must first show that his counsel's performance was deficient. 466 U.S. 668, 687, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984). Counsel's errors must have been so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. *Id.* The scrutiny of counsel's performance is guided by a presumption of effectiveness. *Id.* at 689. In analyzing the first prong, the court must decide whether defense counsel's actions constituted a tactical decision which was part of the normal process of formulating a trial strategy. *See State v. Tarica,* 59 Wn. App. 368, 373 (Div. 1, 1990).

Secondly, the defendant must show that the deficient performance prejudiced the defense. *Id.* at 687. The defendant must show "that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* For prejudice to be claimed there must be a showing that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.*

If both prongs of the test are not met than the defendant cannot claim the error resulted in a breakdown in the adversary process that renders the result unreliable. *Id.* at 687.

The State's argument during closing as to what Appellant did not report following waiver of right to remain silent was proper.

When a defendant does not remain silent and instead talks to police, the state may comment on what he does not say. *State v. Clark*, 143 Wn.2d 731, 765 (2001); *State v. Young*, 89 Wn.2d 613, 621 (1978) (*citing State v. Osborne*, 50 Ohio St.2d 211, 216, 364 N.E.2d 216 (1977), *vacated on other grounds by* 438 U.S. 911, 98 S. Ct. 3137, 57 L.Ed.2d 1157 (1978); *State v. Yates*, 161 Wn.2d 714, 779 (2007).

In *State v. Young*, 89 Wn.2d 613 (1978), the prosecutor was held to have properly argued that Young's failure to make denials in his post-*Miranda* statements to law enforcement supported his guilt. There, Young was convicted of murder in the first degree for mailing a pipe bomb to a Superior Court judge who was ultimately killed by the bomb. *Id.* at 615. Following arrest, Young was properly *Mirandized* by federal postal inspectors; after which, he made statements regarding the incident. *Id.* at 617, 620. During a transport to jail, Young asked why it took so long to find his finger prints on the bomb, he stated that writing on the package was not his, and inquired whether he would be proved innocent if another

bomb exploded while he was in jail. *Id.* at 617. The two inspectors testified as to these statements at trial, and Young did not testify. *Id.* In closing, the prosecutor argued to the jury that Young never denied mailing the bomb and never denied having anything to do with mailing the bomb. *Id.* at 620. In finding the argument proper, the court reasoned, "The prosecutor was entitled to argue the failure of the defendant to disclaim responsibility after he voluntarily waived his right to remain silent and when his questions and comments showed knowledge of the crime." *Id.* at 621.

Similarly in the present case, in closing the State addressed the Appellant's failure to report his knowledge that someone stole his uncle's tools when he made post-*Miranda* inculpatory statements that inferred knowledge of the stolen property. After fleeing a traffic stop, the Appellant was eventually apprehended and read his *Miranda* warnings. The State highlighted the Appellant's statements in closing. The State addressed the Appellant's acknowledgement that he knew the deputy wanted to speak to him about stolen property. The State highlighted that without prompting the Appellant stated he did not know Kelly Marks or Travis Delbrouck "very well." The State highlighted in closing that the Appellant further acknowledged his presence during the sale and that he

received money from Delbrouck, but that they gave each other money at random times. He State further highlighted that the Appellant stated that Delbrouck may have given him meth that he purchased from the proceeds from the sale. The Appellant claimed he was not involved in the theft and/or sale of the stolen property; however, his statements implied that he knew what had occurred. The State properly argued the Appellant's failure to report the criminal activity was inconsistent with his argument that he was not involved, since the Appellant's statements were consistent with the Appellant having knowledge of the theft and/or sale of the stolen property.

In *State v. Fuller*, Division 2 held that the State impermissibly referenced the defendant, Fuller, not responding when a detective advised Fuller a video showed the murderer wearing Fuller's cap. *Fuller*, 169 Wn. App. 797, 819 (Div 2, 2012). Fuller was charged with and following trial convicted of murder. *Id.* at 802-803. During the investigation Fuller submitted to custodial interrogation from Tacoma Police Detective Glenn Miller. During questioning Detective Miller advised Fuller of the video and Fuller responded that he wanted to watch the video. *Id.* at 810-811. The State used Fuller's failure to deny wearing the cap, and failure to deny committing the murder to infer Fuller's guilt. *Id.* at 806-808. The Court

of Appeals found that Fuller exercised his right to remain silent since he did not respond to what the detective advised him and he did not testify at trial. *Id.* at 817-819.

In the present case, the Appellant never exercised his right to remain silent about his knowledge of the stolen tools. He simply advised Deputy Steiner that he was not involved in the theft of the tools and that he was unaware the tools had been stolen.

Given that the argument was proper defense counsel was not deficient, and even if counsel should have objected there was no prejudice to the Appellant. There was sufficient evidence in the Appellant's statements and all other evidence for the jury to have inferred the requisite knowledge, even without consideration of the fact that he did not report the wrongdoing. Therefore, defense counsel was not ineffective.

The State's reference during closing to Delbrouck's statements was for impeachment purposes and proper.

In *State v. Johnson*, the Court of Appeals held a prosecutor properly argued the jury should consider the contents of a prior statement by a witness admitted for the limited purpose of impeachment where the prosecutor's argument addressed the witness' credibility. *Johnson*, 40 Wn. App. 371, 380-381 (Div 3, 1985). In that case, Johnson and McLaws were charged and convicted as accomplices to first degree murder after

breaking into a residence, and, in the course of robbing the occupants, killing the male occupant. *Id.* at 373. McLaws' girlfriend Whitford made statements to police, including that McLaws owned a gun that matched the murder weapon, and showed Whitford marijuana that was packaged the same as that taken from the robbery victims. *Id.* at 381. Whitford testified favorably for Johnson and McLaws, and the prior statements to the police were admitted for the limited purpose of impeachment. *Id.* In closing argument, the prosecutor told the jury they should consider Whitford's statements in determining that she did not testify truthfully. *Id.* In so arguing the prosecutor made reference to the specific substance of Whitford's prior statements. *Id.* In finding the prosecutor acted properly, the court stated, "Generally, counsel is given reasonable latitude to draw and express inferences and deductions from the evidence, including inferences as to a witness' credibility. *Id.* (*citing State v. Adams*, 76 Wn.2d 650, 660 (1969), *rev'd in part*, 403 U.S. 947, 91 S.Ct. 2273, 29 L.Ed.2d 855 (1971).)

In the present case, the State's closing argument used the content of Delbrouck's statement to highlight its inconsistency with his testimony and to show that his testimony was not credible. Delbrouck was called by the defense, not the State. On direct examination, he testified that he did

not pay any of the money he received from Marks for the stolen tools. Further, defense counsel initially raised the fact of Delbrouck's prior written statement to Deputy Steiner. On direct examination Delbrouck testified his prior statement was not consistent with his testimony but that his testimony was "true and accurate of what happened . . . ." On cross examination, Delbrouck made specific statements regarding sharing money from the sale of the stolen items with the Appellant. In closing the State discussed Delbrouck's prior statement to Deputy Steiner, then argued the following:

> Do we want to believe that the defendant – that Mr. Delbrouck was telling the truth on the stand, that the reason he gave [the prior statement to Deputy Steiner] was only because he wanted to get a better deal and not because it was the truth? This is a man who has a history of committing crimes of dishonesty. He acknowledged that he had been convicted of identity theft second degree, trafficking of stolen property second degree, trafficking of stolen property first degree, 2013, 2011, 2009. This is a man who is not – was not to be trusted as far as that testimony.

RP 153.

The State was certainly entitled to argue that given the prior statement, the jury could infer that Delbrouck had in fact shared profits

from the sale of the stolen tools with the Appellant. Doing so was not arguing the substantive nature of the statement; it was merely arguing an inference from the inconsistent statements and the Appellant's propensity for untruthfulness.

State v. Sua, the case argued by the Appellant does not apply here. In *Sua*, the State specifically argued that the prior inconsistent statement was substantive evidence and argued that if the jury believed the prior statement, they should find *Sua* guilty. *Sua*, 115 Wn. App. 29, 38-40, 51-52 (Div 2, 2003). Conversely, in this case the State made no such suggestion that the statement was substantive.

Again, the State's argument was proper, therefore, defense counsel was not deficient for failing to object, and there was no prejudice. Furthermore, even without the substance of Delbrouck's statement, there was sufficient evidence for the jury to have inferred that Delbrouck at a minimum aided and abetted in the trafficking of stolen property. Therefore, defense counsel was not ineffective.

3. Judge Brown made a proper inquiry into Appellant's ability to pay legal financial obligations.

The Appellant next complains of the trial court's determination that he will have the future ability to pay a single discretionary legal financial obligation; the fees for his publicly appointed attorney. The

Appellant alleges the court did not review any facts, and asks this court to second-guess the trial court's determination, based upon the representation that the "defendant is an indigent drug addict with no driver' s license who has a requirement of community custody, mandatory treatment once he is released from prison and non -discretionary legal -financial obligations." Appellant's Brief at 20.

"RCW 10.01.160(3) requires the record to reflect that the sentencing judge made an individualized inquiry into the defendant's current and future ability to pay..." before imposing discretionary legal financial obligations, such as the attorney's fees ordered here. *State v. Blazina*, 182 Wn.2d 827, 839, 344 P.3d 680, 685 (2015).

Contrary to Appellant's assertion that the court did not review any facts, Judge Brown appeared to have made a detailed examination of the Appellant's history, noting that, "...when I look back on your record you had everything. You had a clean slate in 2013. You got your driver's license back. Didn't owe anybody, owed the Court systems any money, and then within a year it's all gone." RP at 184.

Additionally, Judge Brown heard all the facts at trial. The court was aware that the Appellant was addicted to drugs and had no driver's license, but despite that, the court made the determination that "If you turn

your life around you're going to be able to, you know, have a job, make at least partial payments on these minimal costs." RP at 186.

The record reflects that the court made an individualized determination that the Appellant could pay the minimal discretionary legal financial obligation imposed, the $575.00 imposed for his court appointed attorney. *See* CP at 109. This court should leave that determination undisturbed.

4. Imposition of appellate costs to Appellant.

Finally, the Appellant asks this court not to impose appellate costs if the State prevails and moves to impose costs. However, the issue is not yet ripe because the State has not yet asked for costs, or even prevailed.

"'Three requirements compose a claim fit for judicial determination: if the issues raised are primarily legal, do not require further factual development, and the challenged action is final.'" *State v. Bahl*, 164 Wn.2d 739, 751, 193 P.3d 678, 685 (2008) (quoting *First United Methodist Church v. Hr'g Exam'r*, 129 Wash.2d 238, 255–56, 916 P.2d 374 (1996).)

Because no party has yet prevailed, and costs have not been requested, this issue is not ripe. This issue should not be decided unless and until the State requests costs.

CONCLUSION

There was plenty of circumstantial evidence to support the jury's finding that the Appellant knew that the tools were stolen. The prosecutor's arguments were proper, and therefore trial counsel was not ineffective for failing to object. This court should affirm the conviction.

The court clearly made an individualized decision regarding the Appellant's ability to pay the discretionary attorney's fees assessed, and the record reflects it. This court should not second-guess that determination. Finally, the issue of appellate costs is not yet ripe, and therefore this court should not decide the issue.

DATED this 18 day of November, 2016.

Respectfully Submitted,

BY: _____

JASON F. WALKER
Chief Criminal Deputy
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GRAYS HARBOR COUNTY PROSECUTOR

November 18, 2016 - 3:22 PM

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